IRENE PANG MEI FANG v. PP

HIGH COURT MALAYA, MELAKA
MOHD FIRUZ JAFFRIL JC
[CRIMINAL APPEAL NO: 42S-38-12-2013]
15 MAY 2015

CRIMINAL LAW: *Immigration Act 1959/63 – Section 55B(1) – Whether accused employed illegal immigrants without valid work permit – Whether premise where business operated belonged to accused – Whether accused operated business at premise – Whether prima facie case established*

EVIDENCE: *Presumptions – Adverse inference – Failure to call witness – Whether adverse inference ought to be invoked against accused – Whether burden on accused was only to raise reasonable doubt on prosecution's case – Evidence Act 1950, s. 114(g)*

EVIDENCE: *Admissibility – Deposition – Admissibility of deposition – Whether court must accept dispositions as prima facie evidence – Prerequisites – Whether disposition was exception to hearsay rule – Immigration Act 1959/63, s. 40A(1)*

SP1 together with his team from the Immigration Department conducted an operation at the food court, Mahkota Parade. SP1 found two non-citizen of Malaysia in the premise namely Rini Suharti ('Rini') and Dawt Chin Thai ('Dawt'). Amongst the items seized when Rini and Dawt were arrested were (i) MBMB business license; (ii) a copy Rini's passport; and (iii) a UNCHR Refugee card of Dawt. Upon investigation, the investigating officer ('SP9') confirmed that both Rini and Dawt had committed an offence under s. 6(1)(c) of the Immigration Act 1959/63 ('Act'). Nevertheless, both of them were not charged but deported from Malaysia. SP9 took depositions of both Rini and Dawt in accordance s. 40A of the Act. In Rini's deposition, a statement was given that the appellant was her employer. Both Rini and Dawt also provided details of the appellant's IC number. The appellant was then arrested and charged under s. 55B(1) of the Act. At the end of the prosecution's case, the trial judge found that the prosecution had made out a *prima facie* case against the appellant and called the appellant to enter her defence. In essence, the appellant's defence was that the business at the premise concerned, 'Ipoh Delight' was run by her mother in law ('Koo Kuok Ying'). Her defence was supported by her husband ('SD2') who testified that Rini was employed by Koo Kuok Ying from V-Link Services, an outsourcing company. These facts were also disclosed to SP9 during the course of investigations. The appellant also testified that Dawt was a friend of Rini's who came to visit her frequently. This was supported by the testimony of SD3. The trial judge held *inter alia* that the appellant had failed to prove a reasonable doubt on the prosecution's case. Therefore the trial judge convicted and sentenced the appellant to a fine of RM20,000 for each illegal immigrant that was employed by the appellant and in default of payment of fine 12 months imprisonment. Hence the present appeal. The appellant's grounds of appeal

were, amongst others, that (i) the trial judge had erred in fact and in law in failing to find that the prosecution had failed to prove a *prima facie* case; (ii) s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution for failure to tender the salary slip seized from both Rini and Dawt as well as the failure to call SD2 as a witness; and (iii) the trial judge erred in failing to appreciate that the burden on the defence was only to raise a reasonable doubt and not to prove its defence. On the contrary, the prosecution argued that that it had successfully proved a *prima facie* case based on the fact *inter alia* that (i) the premise 'belonged' to the appellant according to the MBMB license; and (ii) the depositions taken from both Rini & Dawt which the court must accept as *prima facie* evidence under s. 40A of the Act. The issue that arose for the court's determination were (i) whether the appellant had employed Rini and Dawt without a valid permit; (ii) whether the prosecution had succeeded in proving a *prima facie* case; and (iii) in the event the prosecution had succeeded proving a *prima facie* case, whether the appellant had succeeded in raising a reasonable doubt on the prosecution's case.

Held (allowing appeal; setting aside order and conviction of Sessions Court):

(1) Despite making a finding that the second ingredient of the charge that both Rini and Dawt were employed without valid permit was duly proved by the prosecution, the court allowed the appellant's appeal in view of the fact that the first ingredient of the charge was not proved. The fact that a person was the registered owner or occupier of the premise where the business operated did not necessarily mean that he or she was the person employing the illegal immigrants. What was needed to be proved was the relationship of employer and employee between the person charged and the illegal immigrants. (paras 17 & 18)

(2) The trial judge placed a considerable amount of reliance on the depositions of both Rini and Dawt under s. 40A of the Act. Such deposition shall without further proof be admitted as *prima facie* evidence of any fact therein. However, the deposition is an exception to the hearsay rule, as such the depositions could only be admitted as evidence in accordance with the provision s. 32(1) of the Evidence Act 1950 being fulfilled. While there was evidence that Rini was deported pursuant to the deportation order, the same could not be said about Dawt who was a UNCHR asylum seeker. Although Dawt was in the country at the time of the trial, no attempt was made to trace her for purposes of procuring her attendance as a witness. Therefore, Dawt's deposition was inadmissible. (paras 20 & 21)

(3) In so far as Rini's deposition was concerned, it was admissible as Rini had been deported, making her unavailable to attend court. However, the court still had to evaluate the weight to be attached to the deposition together with other evidence as it was not subjected to cross-examination

by the opposing party. There was a glaring error in Rini's deposition, where Rini stated that she had no passport. This was not true as her passport was seized and tendered in court by the prosecution. As such, the deposition could be said to be *prima facie* evidence of the fact. (para 22)

(4) The statement in Rini's deposition that the appellant was her employer contradicted the evidence tendered by the prosecution which stated that Rini's employer was V-Link Services Sdn Bhd. In fact, a letter from the Ministry of Home Affairs stated that Rini's employer was V-Link Services. As such, there were two sets of prosecution evidence which contradicted each other. Therefore, two different inferences could be made *ie*, that Rini was employed by the appellant, and that she was employed by V-Link Resources. Based on the case of *Mohd Radzi bin Abu Bakars v. PP*, the inference most favourable to the appellant should be preferred *ie*, that Rini was employed by V-Link Services. (paras 23 & 24)

(5) There was no explanation as to how Rini knew the appellant's IC number, nor how Dawt had a copy of the appellant's IC. SP9 agreed that at the time the deposition was taken a copy of the appellant's IC was not produced and also agreed that no identification was done on the appellant. Bearing in mind that these depositions were not subjected to cross-examination, it raised a doubt as to how Rini and Dawt could make such statements without being assisted by leading questions during the deposition process. As such, the identification of the appellant was inconclusive, unsatisfactory and the identity of the appellant was not proven. (paras 27, 28 & 30)

(6) There was no duty on the defence to call any witness to court to give evidence. The defence failure to call any particular witness could never give rise to a presumption of adverse inference under s. 114(g) of the Evidence Act 1950. Therefore, the trial judge misdirected himself on this issue. Further, there was no burden on the defence to prove reasonable doubt on the prosecution's case. All that was needed to be done by the defence was to raise a reasonable doubt. Even if the premise 'belonged' to the appellant based on the MBMB license, it was of no help to the prosecution's position. SP9 took these documents at face value and failed to make enquiries as to whether it was the appellant or Koo Kuok Ying who was running the business at the premise. The standard of investigation was unsatisfactory and had the effect of depriving the appellant of a fair trial. (paras 32, 34 & 37)

(7) The cross-examination of SD2 and SD3 was focused only on whether Koo Kuok Ying should have come to the court or not. The rest of SD2's testimony that his mother was running the business and that Rini was on loan from V-Link services was never challenged. Equally, SD3's testimony that Koo Kuok Ying was running the business was never challenged. The prosecution also failed to put to SD2 and SD3 that their

testimony was a fabrication. Failure to cross-examine a witness on a crucial part of a case would amount to an acceptance of the witness's testimony. The evidence by SD2 and SD3 was not negated by the prosecution. As such, the trial judge failed to appreciate the effect of the non-challenge by the prosecution on the evidence given by both SD2 and SD3. (para 33)

(8) The appeal record clearly showed that the prosecution's evidence as to Dawt was indeed challenged on numerous occasions. Therefore, there was no *prima facie* case established by the prosecution at the trial. Even if a *prima facie case* was established, a reasonable doubt had been cast on the prosecution's case. (para 37)

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ayoromi Helen v. PP [2005] 1 CLJ 1 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Lim Tiong Seng & Satu Lagi lwn. PP [2011] 5 CLJ 1 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP (Immigration) v. Ana Ekang & Anor [2013] 8 CLJ 429 HC ***(dist)***
PP v. Ku Yahya Ku Bahari & Anor [2000] 3 CLJ 162 HC ***(foll)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(foll)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(foll)***
PP v. Mok Kar Poh [2001] 5 CLJ 206 HC ***(foll)***
PP v. Wong Haur Wei [2008] 7 CLJ 200 HC ***(refd)***
R v. Turnbull [1976] 3 All ER 549 ***(refd)***
Rahmani Ali Mohamad v. PP [2014] 7 CLJ 405 CA ***(refd)***
Tan Kim Hoo v. PP & Another Appeal [2007] 6 CLJ 557 CA ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yau Heng Fang v. PP [1985] 2 CLJ 22; [1985] CLJ (Rep) 350 SC ***(refd)***
Zawiyah Ahmad Adam v. PP [2006] 6 CLJ 258 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 32(1), 114(g)
Immigration Act 1959/63, ss. 6(1)(c), 40A, 55B(1)

For the appellant - Mohamed Musthafa; M/s Mohamed Musthafa & Co
For the accused - Fairuz Syuhada; DPP

Reported by Sandra Gabriel

JUDGMENT

Mohd Firuz Jaffril JC:

[1] This is an appeal against the decision of the Session Court Judge in Machap Umboo, dated 22 November 2013 whereby the appellant was convicted for the charge under s. 55B(1) Immigration Act 1959/63 at the end of full trial. The trial judge gave fine of RM20,000 for each illegal immigrant that been employed by the appellant; and in default of payment of fine 12 months imprisonment. The total amount of fine is RM40,000.

Charge

[2] The appellant was charged as follows:

> Bahawa kamu pada 29.07.2012 jam lebih kurang 12.45 tengahari bertempat di sebuah kedai makan beralamat di lot S6-S8, K19, Second Floor, Food Court Mahkota Parade, 75000 Melaka, dalam daerah Melaka Tengah, dalam negeri Melaka telah mengambil kerja seramai 2 orang warganegara asing iaitu:
>
> 1. RINI SUHARTI (P/INDONESIA/40 TAHUN)
> 2. DAWT CHIN THAI (P/MYANMAR/23 TAHUN)
>
> yang bekerja sebagai pembantu Kedai Makan di tempat tersebut di atas iaitu satu kesalahan di bawah Seksyen 55B(1) Akta Imigresen 1959/63 (Akta 155). Oleh yang demikian kamu didapati telah melakukan kesalahan di bawah Seksyen 55B(1) Akta Imigresen 1959/63 (Pindaan 2002) dan boleh dihukum di bawah Seksyen Akta yang sama.

Brief Facts

[3] SP1 together with his team from the Immigration Department had conducted an operation on 29 July 2012 at the address as per the charge above. SP1 later found two non-citizen of Malaysia in the premise namely Rini Suharti and Dawt Chin Thai.

[4] Rini, at the time of arrest, had produced 6P slip while Dawt had produced the UNCHR card. The search list ie, exh. P4 (referred in p. 342 appeal record) was issued by SP1.

[5] The seized items are as follows:

(i) MBMB business licence;

(ii) A copy of 6P slip on the name of Rini Suharti;

(iii) A copy of Rini Suharti's passport;

(iv) Refugee card of Dawt Chin Thai;

(v) A copy of appointment letter of 6P program;

(vi) Official receipt;

(vii) CIMB bank slip;

(viii) White envelope with V-Link Services chop; and

(ix) 1 unit of apron.

[6] SP1 then arrested both Rini and Dawt and brought them to the Immigration Department office for further investigation.

[7] SP9 (investigating officer) confirmed both Rini and Dawt had committed an offence under s. 6(1)(c) the Immigration Act. Nevertheless, both of them had not been charged but been deported from Malaysia. (Refer exhs. P22a and P22b dated 10 August 2012 at pp. 395 to 398 appeal record).

[8] SP9 then arrested the appellant on 9 August 2012. SP9 took depositions of both Rini and Dawt on 10 August 2012 in accordance s. 40A Immigration Act.

[9] The appellant was charged in the court on 30 August 2012. At the end of the prosecution's case, the learned trial judge found that the prosecution had made out a *prima facie* case against the appellant. The appellant was thus called upon to enter her defence.

[10] During the defence case, the appellant chose to testify under oath. In essence, the appellant's defence was that the business at the premise concerned, 'Ipoh Delight' was run by her mother in law, Koo Kuok Ying. The appellant herself had her own business selling 'putu piring' in Jalan Tengkera. Her defence was supported by her husband, SD2 who testified that Rini was employed by his mother on a trial basis from V-Link Services, an outsourcing company. These facts were disclosed to SP9, the investigating officer during the course of investigations. In so far as Dawt is concerned, she was a friend of Rini's, who came to visit her frequently. This was supported by the testimony of SD3.

[11] The trial judge made the following findings on the defence case (see pp. 60 to 62 of the appeal record):

(i) that the defence forwarded by the appellant that she was not the employer cannot be accepted as it contradicted the deposition given by Rini and Dawt;

(ii) the defence did not call the mother in law to court to strengthen their case despite raising the issue during the prosecution case;

(iii) the mother in law's character was created to put blame on someone else and the court cannot accept the defence as it was not corroborated by that person herself;

(iv) that the testimony of SD2 and SD3 failed to raise any reasonable doubt as it failed to displace the depositions given which was *prima facie* evidence under s. 40A of the Immigration Act; and

(v) the trial judge concluded that the appellant had failed to prove reasonable doubt on the prosecution's case and therefore the appellant was found guilty and convicted of the charge.

The Appeal

[12] Whilst the petition of appeal listed down 38 grounds of appeal, in essence, the appellant's appeal can be summarised as follows:

(i) that the trial judge erred in fact and in law in failing to find that the prosecution had failed to prove a *prima facie* case;

(ii) who had custody and control over the business?;

(iii) that s. 114(g) of the Evidence Act 1950 should be invoked against the prosecution for failure to tender the salary slip seized from both Rini and Dawt as well as the failure to call SD2 as a witness;

(iv) the weakness in the investigation carried out by the investigation officer;

(v) that the trial judge erred in failing to appreciate that the burden on the defence is only to raise a reasonable doubt and not to prove its defence; and

(vi) failure of the prosecution to challenge the evidence given by the defence witnesses.

[13] In so far as the respondent was concerned, there were only three issues for the court to consider at this appeal stage:

(i) that the prosecution had successfully proven a *prima facie* case based on the following:

(a) the premise concerned 'belonged' to the plaintiff based on the MBMB licence issued under her name (exh. P5), the confirmation letter from MBMB (exhs. P18a and P18b) and the testimony of SP7;

(b) the depositions taken from both Rini & Dawt (exhs. P22a and P22b) which the court must accept as *prima facie* evidence;

(c) both Rini and Dawt did not possess valid permits to work in Malaysia; and

(d) the evidence of SP6 that both Rini & Dawt cannot be employed as they do not have the necessary documentation;

(ii) that the defence put forward by the appellant was one of 'bare denial'. The testimony of both SD2 and SD3 were not sufficient as the appellant should have called her mother in law to testify as a witness;

(iii) the fact that the business was run by the appellant's mother in law does not mean that Rini and Dawt were not employed by the appellant;

(iv) that the appellant's testimony that she did not employ Rini and Dawt was illogical;

(v) that the testimony of SD2 and SD3 that Dawt frequented the Mahkota Parade Food Court to visit her friend was an afterthought and recently invented; and

(vi) that the prosecution's evidence as to Dawt was never challenged.

Court's Analysis

[14] Based on submissions by both the appellant and respondent's counsels, I am of the view that there are only two main issues in this appeal before me:

(i) whether the prosecution had succeeded in proving a *prima facie* case; and

(ii) in the event the prosecution had succeeded proving a *prima facie* case, whether the appellant had succeeded in raising a reasonable doubt on the prosecution's case.

[15] Ingredients to be proven by the prosecution against the appellant:

(i) that the appellant was the person who employed Rini and Dawt;

(ii) that Rini and Dawt was employed without a valid permit.

[16] In the event the prosecution fails to prove any of the ingredients, the appellant should be acquitted and discharged. See *Balachandran v. PP* [2005] 1 CLJ 85 at pp. 99 and 100, per Augustine Paul JCA (as he then was):

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof of the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be ratiocinated against the background of the meaning of the phrase '*prima facie* case' in s 180. Section 180(2) provides that the court shall record an order of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie* case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary* 11th Ed as:
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> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
>
> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence

as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

Court's Findings

[17] Having heard and read the submissions by both parties, I am allowing the appeal despite making a finding that the second ingredient of the charge that both Rini and Dawt were employed without valid permit was duly proven by the prosecution.

[18] This is in view of the fact that the first ingredient of the charge was not proven.

[19] Based on submissions of both parties, I am of the view that the fact that a person is the registered owner or occupier of the premise where the business operates, does not necessarily mean that he or she is the person employing the illegal immigrants. What is needed to be proved is the relationship of employer and employee between the person charged and the illegal immigrants. (Case: *PP v. Wong Haur Wei* [2008] 7 CLJ 200; [2008] 1 MLJ 670). In order to determine such, the court may look at other available evidence.

[20] In calling the appellant to enter her defence, the trial judge placed a considerable amount of reliance on exhs. P21a and P21b, namely the depositions of both Rini and Dawt under s. 40A of the Immigration Act which *inter alia* states that any such deposition shall without further proof be admitted as *prima facie* evidence of any fact therein.

[21] I am of the view that the deposition is an exception to the hearsay rule, as such the depositions can only be admitted as evidence in accordance with the provision s. 32(1) of the Evidence Act 1950 being fulfilled ie, that the statement is made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. In fact, a reading of Hansard recording in Parliament show that s. 40A was passed in order not to delay court proceedings where the PATI detained would be keep in detention before trial begins and a long time is taken to trace the employee or person responsible for the PATI concerned. Hence, while there was evidence that Rini was deported pursuant to the deportation order dated

A 10 August 2012 (see exhs. P22a and P22b), the same cannot be said about Dawt. Based on exh. P8 (seized from Dawt), Dawt was a UNCHR asylum seeker. The investigating officer did not agree to this but did nothing to confirm Dawt's status in Malaysia. Exhibit D25 (see p. 403 of the appeal record) which was shown to the investigating officer during cross B examination clearly shows that Dawt was in the country at the time of the trial (see p. 75 of the RRT). Yet no attempt was made to trace her for purposes of procuring her attendance as a witness. No explanation was given as to why Dawt's attendance could not be procured. That being the case, I am of the view that Dawt's deposition as in exh. P21b is inadmissible.

C **[22]** In so far as Rini's deposition as in exh. P21a is concerned, I am of the view that it is admissible as Rini had been deported, making her unavailable to attend court. Despite s. 40A of the Immigration Act providing that such a deposition is to be admitted as *prima facie* evidence of any of the facts stated therein, the court still has to evaluate the weight to be attached to the D deposition together with other evidence (if any) as it was not subjected to cross examination by the opposing party. In this instance, first and foremost, there is a glaring error in P21a, where Rini stated that she had no passport. This is not true as her passport was seized and tendered in court by the prosecution (see exh. P7). As such, the deposition cannot be said to be *prima* E *facie* evidence of the fact stated therein as propounded in the case of *Zawiyah Ahmad Adam v. PP* [2006] 6 CLJ 258.

[23] I also find that the statement in Rini's deposition that the appellant was her employer contradicts exh. P6 tendered by the prosecution. P6 clearly states that Rini's employer was V-Link Services Sdn Bhd. There were other F available evidence too which shows the link between Rini and V-Link Services such as exhs. P9 and P12. No investigation was done to ascertain this information despite Rini informing the IO of this fact. (see p. 73 line 20 to p. 74 of the RRT). In fact exh. P179 which is a letter from the Ministry of Home Affairs clearly states that Rini's employer was V-Link Services. That G being the case, there are two sets of prosecution evidence which contradicts each other. I am inclined to follow the decision in *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534 as well as the case of *PP v. Mok Kar Poh* [2001] 5 CLJ 206, Vincent Ng J in *PP v. Lee Eng Kooi*:

> H If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation …

I **[24]** I am also of the view that based on exh. P21a and P6, two different inferences can be made:

(i) that Rini was employed by the appellant; and

(ii) that she was employed by V-Link Resources. I am bound to follow the decision in Federal Court decision in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 which held that:

> if the prosecution's evidence admits two or more inferences, one of which is the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.

Here, the inference most favourable to the appellant should be preferred ie, that Rini was employed by V-Link Services.

[25] In the event, I am wrong in deciding the issue on the admissibility of the depositions of both Rini and Dawt, I am compelled to state that I am totally dissatisfied with how the identification of the appellant was carried out. The Supreme Court had on two occasions held that, "in proving the ingredients of the charge in all cases, must include the identity of the accused" (see *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 at p. 229 (CLJ); p. 498 para. 1 (MLJ) and *Yau Heng Fang v. Public Prosecutor* [1985] 2 CLJ 22; [1985] CLJ (Rep) 350; [1985] 2 MLJ 335):

[26] In Rini's deposition, she gave a statement that Irene Pang Mei Fang 791118-04-5110 was her employer. (See p. 389 of the appeal record). In Dawt's deposition, she referred to a photo of Irene Pang Mei Fang 791118-04-5110 as her employer (see p. 390 of the appeal record).

[27] There was no explanation as to how Rini knew the appellant's IC number, nor how Dawt had a copy of the appellant's IC. It should be noted that the appellant's IC was never produced as evidence in court at any point in time. In fact at p. 73 of the RRT, the investigating officer agreed that at the time the deposition was taken a copy of the appellant's IC was not produced. At p. 74 of the RRT, the IO also agreed that no identification was done on the appellant. Bearing in mind that these depositions were not subjected to cross examination, it raises a doubt as to how Rini and Dawt could make such statements without being ably assisted by leading questions during the deposition process.

[28] In view of the fact that the appellant's IC was never produced as evidence in court and the fact that there was no ID parade nor identification of the appellant from the dock being carried out, to my mind the identification of the appellant is inconclusive and unsatisfactory. In deciding so, I am distinguishing the case of *PP (Immigration) v. Ana Ekang & Anor* [2013] 8 CLJ 429 whereby one of the PATI caught at the premise, Kasmiatun Rikan told the immigration officers concerned that their identification cards were kept by her employer. She then called the employer to come to premise concerned, wherein the accused duly came and brought the passports of the PATI concerned. In saying that the identification of the appellant is unsatisfactory, I am guided by the principles laid down in *R v.*

A *Turnbull* [1976] 3 All ER 549 which has been followed by the Malaysian Courts in numerous cases including *Lim Tiong Seng & Saru Lagi lwn. PP* [2011] 5 CLJ 1; [2011] 4 MLJ 411, which was also followed in *Tan Kim Hoo v. PP & Another Appeal* [2007] 6 CLJ 557.

B **[29]** The principles laid down in *R v. Turnbull* are as follows:

> The first question which a judge should ask when encountering a criminal case where there is identification evidence, is whether the case against the accused depends wholly or substantially on the correctness of the identification evidence which a alleged by the defence to be mistaken.
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> C If so, the second question should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, the presence of obstruction in the way of the observation, the number of D times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the E accused. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If after evaluation of the identification evidence, the judge is satisfied that the quality of the identification evidence is good, he may then go on to safely assess the value of the identification evidence.
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> F Where the quality of the identification evidence is poor, the judge should go on to ask the third question. Is there any other evidence which goes to support the correctness of the identification? If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification G evidence would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v. Baskerville* [1916] 2 KB 658. What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.

[30] Based on the above guidelines, I am of the view, that the identity of H the appellant was not proven.

[31] The next issue is the trial judge's finding on the defence's failure to call the appellant's mother in law. In arriving at this finding, the trial judge was of the view that the mother in law's character was created to put the blame on someone else.

I **[32]** It is trite law that there is no duty on the defence to call any witness to court to give evidence. The defence's failure to call any particular witness can never give rise to a presumption of adverse inference under s. 114(g) of the Evidence Act 1950. The existence of the mother in law, Koo Kuok Ying,

was disclosed to the investigating officer at the first available opportunity by SD2 and the appellant herself (see p. 68 of the rekod rayuan tambahan). This was further enhanced by the statement given by the appellant to the investigating officer as in exh. D25a-c. The value of such an exculpatory statement was highlighted by the Federal Court in the case of *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705. I am therefore of the view that the trial judge misdirected himself on this issue.

[33] In so far as the trial judge's finding that SD2 and SD3 did not manage to displace the depositions, the trial judge failed to appreciate the effect of the non-challenge by the prosecution on the evidence given by both SD2 and SD3. The cross examination of SD2 (see pp. 102 to 104 of the RRT) and SD3 (see pp. 108-109) was focused only on whether Koo Kuok Ying or Aunty Ying should have come to court or not. The rest of SD2's testimony that his mother was running the business and that Rini was on loan from V-Link services was never challenged. Equally, SD3's testimony that Aunty Ying was running the business was never challenged. The prosecution also failed to put to SD2 and SD3 that their testimony was a fabrication.

[34] It is trite law, that "there is a general rule, failure to cross examine a witness on a crucial part of a case will amount to an acceptance of the witness's testimony …" see *Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138; [1981] 1 MLJ 212 at p. 213. In fact the evidence by SD2 and SD3 was not negated by the prosecution at all (see the Court of Appeal decision *Ayoromi Helen v. PP* [2005] 1 CLJ 1; [2005] 1 MLJ 700.)

[35] I now come to the trial judge's finding that the appellant failed to prove reasonable doubt on the prosecution's case. This is clearly a gross misdirection as there is no burden on the defence to prove such. All that needs to be done by the defence is to raise a reasonable doubt. There is a clear and distinctive difference between the need to prove a reasonable doubt and the duty to raise a reasonable doubt.

[36] In *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169 the Federal Court held as follows:

> It is a well established principle of Malaysian Criminal Law that the general burden of proof lays throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence.

[37] I am also inclined to follow the judgment of PS Gill J as he then was *PP v. Ku Yahya Ku Bahari & Anor* [2000] 3 CLJ 162 where he held as follows:

> It is an undisputable fact that the principle of Malaysian Criminal Law, is that that the general burden of proof lies throughout the trial, on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged There is no similar burden placed

A on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal the accused is to cast a reasonable doubt.

Respondent's Submission

B **[38]** For the sake of completeness, I shall now proceed to deal with the respondent's submission in brief:

(i) that the prosecution had successfully proven a *prima facie* case based on the following:

C (a) the premise concerned 'belonged' to the plaintiff based on the MBMB licence issued under her name (exh. P5), the confirmation letter from MBMB (exhs. P18a and P18b) and the testimony of SP7;

(b) the depositions taken from both Rini & Dawt (exhs. P22a and P22b) which the court must accept as *prima facie* evidence;

D (c) both Rini and Dawt did not possess valid permits to work in Malaysia; and

(d) the evidence of SP6 that both Rini & Dawt cannot be employed as they do not have the necessary documentation.

E Based on my findings as stated in paras. 16 to 28, I am of the view that, even if the premise concerned 'belonged' to the plaintiff based on the MBMB licence issued under her name (exh. P5), the confirmation letter from MBMB (exhs. P18a and P18b) and the testimony of SP7, all these offer no help to the respondent's position. Furthermore, the investigating officer took these documents at face value and failed to F make enquiries with the management of the food court centre and as well as the neighbouring food stall operators as to whether it was the appellant or her mother in law who was running the business at the premise. In fact the investigating officer agreed that the appellant's involvement in the business was in name only (see pp. 68 to 71 of the G RRT). Again, the standard of investigation is unsatisfactory and had the effect of depriving the appellant of a fair trial. Further, despite the raiding officer's testimony that Rini's salary slip was seized during the raid, it was never tendered as evidence, the reason being that it cannot be found (see p. 68 RRT). I pause here to state that the failure to offer H a reasonable explanation as to the missing salary slip gives rise to a presumption of adverse inference under s. 114(g) of the Evidence Act 1950 against the prosecution.

The importance of a thorough investigation has been spelt out in a number of cases. Suffice if I were to just quote the Court of Appeal I decision in *Rahmani Ali Mohamad v. PP* [2014] 7 CLJ 405 per Azhar Mohamad JCA:

> … The appellant cannot be penalised for lack of ingenuity, negligence or inadvertence on the part of the investigator depriving him of the time honoured benefit of doubt … In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice …

(ii) that the defence put forward by the appellant was one of 'bare denial'. The testimony of SD2 and SD3 was not sufficient as the appellant should have called her mother in law to testify as a witness.

The court's finding: the defence put forward by the appellant is not one of bare denial. There is no duty on the appellant to call her mother in law to testify;

(iii) the fact that the business was run by the appellant's mother in law does not mean that Rini and Dawt were not employed by the appellant;

(iv) that the appellant's testimony that she did not employ Rini and Dawt was illogical;

(v) that the testimony of SD2 and SD3 that Dawt frequented the premise was recently invented.

In light of my finding on the depositions given by both Rini and Dawt as stated above, submissions nos. iii, iv and v are non-starters; and

(vi) that the prosecution's evidence as to Dawt was never challenged.

[39] The above argument is misplaced. The appeal record clearly shows that the prosecution's evidence as to Dawt was indeed challenged on numerous occasions. In fact throughout the trial, the appellant's counsel went through great length as to Dawt's presence at the premise as well the photographs taken by the raiding team of Dawt firstly, in T-shirt, then with the apron on, the photographs of her cooking and the fact that Dawt's deposition never said that she was working at Ipoh Delight with Rini can be seen at page of the RRT.

Conclusion

[40] In the above premise, I find that no *prima facie* case was established by the prosecution at the trial. Even if a *prima facie* case was established, the appellant had through her testimony, exh. D25 a-c, the testimony of SD2 and SD3 managed to create a reasonable doubt on the prosecution's case.

[41] I therefore, allow the appellant's appeal and set aside the order and conviction of the Sessions Court dated 22 November 2013.